Supreme Court, U.S.
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No. 98-964

In the Supreme Court of the United States

OCTOBER TERM, 1997

DILAWAR EDWARDS,
Petitioners

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; *et al.*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public university professor has a First Amendment right to choose the curriculum for use in a university sponsored course when his choice contravenes the express policy of the institution?

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STATEMENT OF THE CASE

The question in this case is who has the ultimate authority to make curriculum decisions for courses offered at a public university: the school's administrators or the professors assigned by the university to teach those courses. Petitioner, a tenured professor, alleged that university officials violated his right to free speech under the First Amendment by directing him to "cease and desist" from using certain textbooks and other materials of a religious nature which they decided had no bearing on the education course which he had been assigned to teach. Pet. App. at A2-3.

1. Petitioner has been a tenured professor in the education department at the California University of Pennsylvania for over fifteen years. Pet. at 2. During the time-period at issue in this case, petitioner was assigned to teach a course entitled "Introduction to Educational Media" (IEM). Pet. App. at A3. The course was originally designed to introduce students to the use of media in the classroom and to develop skills in creating an effective learning environment. *Id.* However, petitioner subsequently revised the course syllabus to include materials advocating the teaching of "creationism" and attacking the teaching of evolution, "secular humanism," and a perceived liberal bias in the media. *Id.*

University officials received complaints from students that petitioner was using books and other materials to advocate his personal religious views in the classroom. *Id.* Although he was directed on several occasions, both in writing and in person, to discontinue using the disputed materials from 1989 through 1993, petitioner failed to comply with the administration's request, even after the education department's curriculum committee voted to re-approve the original syllabus for the IEM

course. *Id.* at A4-5. As a result of the ongoing dispute, university officials scheduled a meeting to discuss their concerns. *Id.* When petitioner claimed that he was unprepared for the meeting, he was suspended with pay until he was prepared to address the University's concerns. *Id.* at A5. Petitioner's suspension was lifted and he returned to the classroom at the beginning of the 1994 Spring semester. *Id.*

2. In the midst of this dispute, petitioner commenced the present action in September 1991 in the District Court for the Western District of Pennsylvania seeking damages and injunctive relief for alleged violations of his constitutional rights pursuant to 42 U.S.C. §1983. In the second amended complaint filed in October 1993, petitioner alleged that respondents had deprived him of his right to free speech, due process, and equal protection by placing restrictions on the curriculum which could be included in the IEM course, criticizing his teaching methods, and suspending him with pay from his teaching duties for a portion of the 1993 Fall Semester. Petitioner additionally alleged that respondents had retaliated against him for filing this lawsuit. *Id.* at A2.

The District Court dismissed prior to trial all petitioner's claims except his free speech and retaliation claims. Those claims were then tried before a jury. *Id.* At the conclusion of the evidence, the District Court instructed the jury that to prevail respondents had to show that their actions were "reasonably related to a legitimate educational interest." *Id.* at A6. The jury returned a verdict in favor of respondents on both the free speech and retaliation claims. *Id.* at A3.

3. In the Court of Appeals, petitioner argued that he was entitled to a new trial because the District Court's jury instruction on the standard to be applied under the First

Amendment was improper. *Id.* at A6. Although petitioner agreed with the District Court that the correct standard was whether the university's actions were "reasonably related to a legitimate educational interest," as enunciated in this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), he argued that the District Court did not sufficiently explain this standard so as to allow the jury to apply it to the particular facts of this case. Pet. App. at A6.

The Court of Appeals, however, did not reach this question because it held that "as a threshold matter . . . a public university professor does not have a First Amendment right to decide what will be taught in the classroom." *Id.* In reaching this conclusion, the Court of Appeals found that under the facts of this case, involving a purely internal institutional dispute over the choice of in-class curriculum, the "University itself was acting as speaker and was entitled to make content-based choices in restricting [petitioner's] syllabus." *Id.* The Court of Appeals also relied extensively on this Court's decisions in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), and *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), in which the rights of a public university as a speaker in shaping its own curriculum and the parameters of academic freedom under the First Amendment were addressed. Pet. App. at A7-9. Accordingly, the Court of Appeals affirmed the District Court's decision to deny a new trial. *Id.* at A11.

REASONS FOR DENYING THE WRIT

The Court Of Appeals Applied Well Settled Law About Which There Is No Circuit Conflict.

According to petitioner, the Court of Appeals held that "the First Amendment provides no protection for in-class teaching by professors at public universities." Pet. at i. This is incorrect. Nothing in the Court of Appeals' decision suggests that professors' in-class speech is *never* protected by the First Amendment. Rather, the Court of Appeals addressed the much narrower question of whether such professors may override decisions of the university on the content of the university curriculum. In holding that professors have no First Amendment right "to choose classroom materials and subjects in contravention of university dictates," Pet. App. at A11, the Court of Appeals was fully in accord with the decisions of this and other courts.

Petitioner maintains that there is a "compelling need for clarification of the parameters of individual academic freedom of faculty when in conflict with the academic discretion of the university." Pet. at 12. But the right of public universities to make curriculum decisions is well established by decisions of the Court. *See Rosenberger v. University of Virginia*, 515 U.S. 819, 833 (1995) ("when the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed . . . ."); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (restrictions on student speech in school newspaper permissible regulation of curriculum under First Amendment); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) (recognizing university's autonomous right to make academic decisions in upholding dismissal of student from

graduate program); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (university has right to determine "who may teach, *what may be taught*, how it shall be taught, and who may be admitted to study") (*emphasis added*). This case is simply not the proper vehicle to address petitioner's broader concerns about the limits of academic freedom in our society.[1]

Moreover, the circuit conflict petitioner perceives is illusory. Almost all the cases petitioner cites either do not involve a university or other academic institution as employer, or involve speech outside the classroom.[2] Of the cases cited to

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[1] Petitioner argues, *inter alia*, that this Court should review the Third Circuit's decision in this case to clarify whether the standard adopted by this Court in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("genuine academic decision" of a college or university should be overturned only if "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment"), should be used in reviewing curriculum based decisions. This issue was not raised in the District Court or the Court of Appeals. In fact, this Court's decision in Ewing is not discussed or even cited to in petitioner's brief to the Third Circuit.

[2] The petition includes a lengthy discussion of the First Amendment protections afforded public employees under *Connick v. Meyers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968). However, the *Connick-Pickering* line of cases involve adverse employment actions affecting a property or liberty interest while the present case does not. Most of the cases cited by petitioner are further distinguishable because they do not involve the in-class speech of professors at a public university.

by petitioner which actually do involve in-class speech, none holds that a university professor or public school teacher has a First Amendment right to override the curriculum-based decisions of his or her employer. *See Ward v. Hickey*, 998 F.2d 448 (1st Cir. 1993) (school may terminate teacher for statements made during class regarding abortion so long as it gives prior notice that topic is not part of approved curriculum); *Blum v. Schegel*, 18 F.3d 1005 (2d Cir. 1994) (law school professor failed to establish that denial of tenure was the result of statements made in and out of class advocating legalization of marijuana); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Ed.*, 42 F.3d 719 (2d Cir. 1994) (upholding school board's censure of guest lecturer); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.) (upholding transfer of teacher for selection of inappropriate material for school play), *cert. denied*, ___ U.S. ___, 119 S.Ct. 47 (1998); *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir.) (university administration's decision to change grade over objection of professor does not infringe rights under First Amendment), *cert. denied*, 457 U.S. 1106 (1982); *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991) (teacher's comments made during class regarding sexual relationship of two students not protected under First Amendment).

The only appellate decision cited by petitioner which addresses the specific issue of curriculum-related speech by a university professor is *Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992). However, in *Bishop* the Eleventh Circuit held that a public university did not violate a professor's free speech rights by prohibiting him from interjecting his personal religious beliefs during class time or conducting optional classes to discuss the Christian perspective on academic topics. Accordingly, both the court in *Bishop* and the Court of Appeals in the present case, under very similar facts,

reached the same conclusion regarding the rights of public universities to control the in-class curriculum-related speech of professors. Any differences between the reasoning or analysis employed by the two courts in reaching this result are not substantial enough to warrant granting the petition.[3]

Far from being in conflict, the courts of appeals are in consensus with the Third Circuit's conclusion that an individual professor does not have a right to override the curriculum decisions of a public university under the First Amendment. *See, e.g.*, *Ward*, 998 F.2d 448, 453 (1st Cir.) ("teacher's statements in class during an instructional period are . . . part of [the] curriculum and a regular class activity. . . . subject to reasonable speech regulation."); *Silano*, 42 F.3d 719 (2d Cir.) (school board's censure of guest lecturer invited to speak in classroom on

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[3] Petitioner maintains that the standard of review used by the Court of Appeals in this case is inconsistent with the balancing test established by this Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding restrictions on expression of students in school newspaper) and relied upon by the Eleventh Circuit Court of Appeals in *Bishop*. However the Court of Appeals in the present case did not repudiate the balancing test used in *Hazelwood* or even suggest that such an approach was not appropriate. Rather, it merely concluded that any error by the District Court in explaining the "reasonably related to a legitimate educational interest" standard was immaterial under the particular facts of this case since the interest of the university in controlling its curriculum is always a legitimate educational interest which outweighs the free speech interests of professors. Furthermore, even if petitioner were correct that the Third Circuit should have engaged in the same balancing approach used in *Hazelwood*, there is no reason to believe that the outcome would have been different since the jury instruction used by the district court in this case was modeled on language from that case.

subject related to curriculum did not violate First Amendment); *Boring*, 136 F.3d 364, 370 (4th Cir.) (*en banc*) ("we agree with Plato and Burke and Justice Frankfurter [in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957] that the School, not the teacher, has the right to fix the curriculum"); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) ("Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula."); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) (teacher's disagreement with school officials concerning content of curriculum not a matter of public concern protected by First Amendment), *cert. denied*, 411 U.S. 972 (1973). Petitioner has simply failed to show that the decision by the Court of Appeals in this case conflicts with the holdings of this Court in *Rosenberger*, *Hazelwood*, and *Ewing*, or any of the numerous circuit court decisions he cites.

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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